IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DIANA FRICK and JOSEPH FRICK, her husband Plaintiffs, vs. BIG LOTS STORES, INC. Defendant. vs. BUREAU VERITAS CONSUMER PRODUCTS SERVICES, INC.; BUREAU VERITAS CONSUMER PRODUCTS SERVICES (INDIA) PVT. LTD.; DESIGNCO OVERSEAS PRIVATE LIMITED a/k/a DESIGNCO INDIA d/b/a DESIGNCO; AND HOC INDUSTRIES, INC. f/k/a THE HOME OIL COMPANY f/k/a THE HOME OIL COMPANY, INC. d/b/a HOMESTAR Third Party Defendants.	)	Civil Action No. 2:15-cv-00360 JUDGE CERCONE

PLAINTIFFS' MOTION TO COMPEL ESI DISCOVERY

AND NOW, come the Plaintiffs, Diana Frick and her husband Joseph Frick, by and through their attorney, Michael C. George, Esquire, and file the within Motion to Compel ESI Discovery and aver in support thereof as follows:

1. Plaintiffs were permanently and horrendously injured on May 19, 2013, when a table top torch and torch fuel, purchased from Defendant Big Lots Stores, Inc. (hereinafter "Big Lots") exploded, engulfing Mrs. Frick in ignited torch fuel. Mrs. Frick

suffered second and third degree burns over 25% of her total body surface area which have permanently scarred and horribly disfigured her.

2. On February 12, 2016, Plaintiffs served Defendant Big Lots with its First Set of Interrogatories and Request for Production of Documents by U.S. mail and electronic mail.

3. Big Lots and Plaintiffs met and conferred on June 3, 2016 pursuant to Rule 26(f) and Court Order dated May 18, 2016. A Court Order was necessary to compel Big Lots to meet and confer because Big Lots had previously refused to do so, despite the clear language of the Rule requiring the Parties to meet "as soon as practicable."

4. Big Lots served objections, answers and responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents on June 17, 2016.[1]

5. The Parties filed a Consolidated 26(f) Report with the Court on July 6, 2016, stating that the parties are seeking Electronically Stored Information (hereinafter "ESI") and that metadata will be relevant in this case, attached hereto as Exhibit A.

6. The Parties further agreed to the format for production of ESI and the use of search terms, in principle[2]. Big Lots and Third Party Plaintiffs were to propose a production format and search terms, Plaintiffs were then to review these materials and recommend changes if needed. Big Lots further agreed to provide Plaintiffs with a listing and description of the custodial and non-custodial sources of ESI known to Big

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[1] The Court entered a protective order on May 18, 2016 and pursuant to Court Order dated February 10, 2016, Big Lots was not required to respond to Plaintiffs' previously served discovery until that time.

[2] Prior to filing of the Consolidated 26(f) Report, counsel for Big Lots provided Plaintiffs with Big Lots' proposed search terms and production specifications and stating that Big Lots is "working on finalizing the terms for the third-party claims." See email dated July 5, 2016 attached hereto as Exhibit B. During the Course of the Rule 26(f) Conference on July 6, 2016, Plaintiffs informed Big Lots that the July 5, 2016,

Lots and to identify those that Big Lots believed are reasonably calculated to contain relevant ESI (hereinafter "Source List") so that Plaintiffs could incorporate this information into their proposed changes to a proposed ESI Protocol and Search Terms.

7. Plaintiffs requested the previously agreed upon Source List, ESI Protocol, and Search Terms by email on June 8, 2016, June 23, 2016, and June 30 2016 without acknowledgment or response from Big Lots. During the course of the July 7, 2016 Initial Scheduling Conference with the Court, Plaintiffs informed the Court that they were awaiting additional materials from Big Lots and that Plaintiffs disagreed with many of the objections, claims of privilege and non-responsive answers previously provided by Big Lots but that they had no reason to believe that those deficiencies could not be worked out without Court intervention. Plaintiffs also informed Big Lots that they were awaiting these materials during the course of two conference calls held on September 8 and 13, 2016, and yet none of these materials were provided.

8. On September 28, 2016, and without the benefit of the Source List, Plaintiffs provided Big Lots with its own Proposed ESI Protocol.

9. A third teleconference occurred on September 28, 2016 to discuss Plaintiffs' Proposed ESI Protocol. Big Lots' Counsel Zach T. Meyer again agreed to provide the Source List. Mr. Meyer expected to provide Plaintiffs with the Source List by October 7, 2016 but at the time of this filing Big Lots has not provided any such list to Plaintiffs. Big Lots also agreed to provide Plaintiffs with a redlined version of their ESI Production Protocol.

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proposal was insufficient and Big Lots agreed to provide a more thorough protocol and set of search terms. Another proposal was never received by Plaintiffs.

10. On September 30, 2016 Big Lots provided Plaintiffs with a redlined version of Plaintiffs proposed ESI Protocol. Big Lots was "generally agreeable" to Plaintiffs Proposed ESI Protocol; however, Big Lots agreed only to the protocol "going forward – for the production we already made it would be difficult to produce accordingly for all ESI Protocol without completing starting over which would be unreasonably expensive." See Email dated September 30, 2016 attached hereto as Exhibit C.

11. On October 3, 2016, Plaintiffs responded requesting a metadata overlay for the prior production rather than reproducing the prior materials entirely and informing Big Lots that if ESI matters could not be resolved forthwith that Plaintiffs would be compelled to seek Court intervention due to the impending discovery deadline. Id.

12. Later that day, Big Lots identified seven previously undisclosed custodians and proposed one additional search term. Plaintiffs responded on October 4, 2016, asking that Big Lots (1) reconsider including some measure that search terms are reasonable in the Proposed ESI Protocol, (2) respond to Plaintiffs request for metadata and electronic text for documents already produced per their October 3, 2016 email, (3) consider the search terms provided by Plaintiffs, (4) again consider Plaintiffs opinion that the relevant time period to be searched for responsive documents should begin at the time Big Lots first began contemplating the sale of the subject products and continuing through the present time and (5) be reminded that they have a duty to conduct a reasonable search for responsive documents and be made aware that Plaintiffs do not agree to limit that search to the eleven custodians identified by Big Lots. See email dated October 4, 2016, attached hereto as Exhibit D

13. At the time of this filing, Big Lots has not responded to Plaintiffs requests and Plaintiffs, after making exhaustive efforts to obtain relief without the Court's intervention, are compelled to file this Motion.

14. This Motion seeks entry of an ESI Protocol that includes some reasonable measure of the utility of search terms. This Motion further seeks to compel Big Lots to provide Plaintiffs with metadata and electronic text for documents previously produced, expand its search for responsive documents to include the period beginning when Big Lots' first contemplated the sale of the subject products and ending at the present time, demonstrate that Big Lots' proposal to limit its search for responsive documents to eleven custodians only is reasonable, and demonstrate that its past and proposed search methodologies are reasonable.

Entry of an ESI Protocol

15. This Court has waited since the filing of the July 6, 2016 Consolidated Rule 26(f) Report for the Plaintiffs and Big Lots to agree on an ESI Protocol.

16. The Sedona Principles Addressing Electronic Document Production, which are frequently cited by federal courts addressing ESI, also suggest that memorializing an ESI Protocol in an Order of Court. Sedona Principles (June 2007), at 9 ("a court order" should "embody" an ESI agreement).

17. Plaintiffs have agreed to all proposed changes to the Proposed ESI Protocol made by Big Lots with the exception of the sentences proposed to be struck by Big Lots from Section III(A) Search Terms. See Exhibit C and Redlined Production Protocol, attached hereto as Exhibit E

18. The first section of disputed language provides that the party utilizing search terms is to provide statistics on the raw numbers of documents responsive to each search term, the terms in whole and the number of document against which the terms were run, so as to provide data to assess the success of these terms at narrowing the collection where feasible.

19. The second section of disputed language expresses an expectation that the parties utilizing search terms will use statistical sampling to calculate "recall" (a percentage calculated by dividing the number of relevant documents with search terms in the sample by the number of relevant documents in the sample, regardless of whether or not they contained search terms) and "precision" (a percentage calculation of all relevant documents in the sample divided by the number of documents returned by the search). The language then goes on to declare the intent of the parties to agree upon a search methodology that will have statistical validity.

20. In Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.D.R. 251, 262 (D. Md. 2008), the Court discussed the difficulties of designing an effective search methodology and concluded that the party performing the search had a duty to demonstrate that its methodology was reasonable.

21. There the Court summarized:

> In this case, the Defendants have failed to demonstrate that the keyword search they performed on the text-searchable ESI was reasonable. Defendants neither identified the keywords selected nor the qualifications of the persons who selected them to design a proper search; they failed to demonstrate that there was quality-assurance testing; and when their production was challenged by the Plaintiff, they failed to carry their burden of explaining what they had done and why it was sufficient.

22. Similarly, in Smith v. Life Investors Insurance Company of America, 2:07-cv-681 Doc 200 (W.D.PA 2009)(McVerry) the Court compelled Defendant to provide a "thorough explanation of the search terms and procedures used."

23. Plaintiffs aver that the language of Section III(A) of the Proposed Production Protocol provides a mechanism for the Parties to assess whether the search terms run by Big Lots comport with the duty to conduct a reasonable inquiry in response to a discovery request as required by Fed. Rule of Civ. P. 26(g).

24. Inclusion of that language further allows the Parties to assess whether a particular term, proposed term, or set of terms is behaving as intended and, should a disagreement arise, for this Court to assess the validity of those terms.

25. Therefore, Plaintiffs respectfully request that this Court enter the Production Protocol attached hereto as Exhibit F so that its terms become binding upon Big Lots and Plaintiffs.

Defendant has Refused to Produce ESI in a Reasonably Useful Format

26. Under the Federal Rules of Civil Procedure, a party responding to a request for production of documents should produce ESI in the format in which it is ordinarily stored. See Fed. R. CIv. P. 34(b)(2)(E)(ii).

27. The responding party may also produce ESI in another format, but only if that format is "reasonably useful." Id.

28. The advisory committee note to the 2006 amendments to Rule 34(b) stated that "[t]he option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in

which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation."

29. Although the rules allow a requesting party to request a specific format for ESI production, they do not require the requesting party to do so because, in many cases, the requesting party simply does not have sufficient information to know in what format the ESI is ordinarily maintained. Thus when the requesting party does not specify a format, the Rules require the responding party to state the format that it indends to use, in order to avoid needless disputes about the format of ESI production. See Fed. R. Civ. P. 34(b)(2)(B). In the present case, Big Lots failed to do so.

30. The documents provided by Big Lots in their June 17, 2016 production to Plaintiffs consist of 31 PDF files. These PDFs do not contain searchable native next from the electronic documents, nor do they contain metadata that would be available to anyone handling the original documents in their ordinary course.

31. Producing electronic files in this format, rather than producing the electronic text and metadata itself, downgrades its usefulness to the point that it is not materially different from reducing the electronic documents to paper.

32. On September 30, 2016, Big Lots alerted Plaintiffs of its intent to apply any agreed upon ESI Protocol on a going forward basis without producing metadata or electronic searchable text for documents already produced as it "would be unreasonably expensive."

33. However, the burdensomeness of producing the metadata and text for documents previously produced is entirely of Defendant's own making. Had Big Lots

simply stated its intent and conferred with Plaintiffs, they would have been able to produce documents in a reasonably useful format.

34. Big lots should not be allowed to rely on its own failure to state its intent as to format of production to establish burdensomeness.

35. Therefore Plaintiffs ask that this Court compel Big Lots to produce this ESI in a format that is reasonably useful including metadata and electronic text.

Defendant Unreasonably Limits its Search for Responsive Documents by Narrowly Limiting the Time, Custodians, and Search Terms Used

36. Through its email dated October 3, 2016, Big Lots made clear that it now intends to limit its search for responsive materials to the four custodians previously identified on July 5, 2016 and seven newly identified custodians, therefore limiting Big Lots search for responsive documents to a mere eleven individual custodians. See Exhibit D at page 2; see also Exhibit B.

37. Big Lots further made clear that it intends to utilize the search term list, previously rejected during the course of the 26(f) Conference with the addition of one new search term, namely "SKU 810059897." Id.

38. Finally, Big Lots alerted Plaintiffs of its intent to limit any search to documents "for the June 2012 – May 2013 time period" that was similarly rejected during the course of the 26(f) Conference four months earlier. Id.

39. On October 4, 2016, Plaintiffs responded by email attaching their own proposed search terms, crafted without the benefit of the previously promised Source

List or access to Big Lots ESI, and informed Big Lots that its proposed terms appeared to be wholly insufficient. See Exhibit D. Plaintiffs further informed Big Lots that Plaintiff do not consent to limit the search of ESI to eleven custodians and again reminded Big Lots of its duty to conduct a reasonable search for responsive records. Plaintiffs also again informed Big Lots that it believes a reasonable search would need to include the time period beginning at which Big Lots began contemplating designing, manufacturing, or selling the subject products and ending at the present time. Plaintiffs wrote this email in a good faith attempt to meet and confer with Big Lots and invited Big Lots to contact plaintiffs "by phone or email to discuss these matters" and but have had no response since that time.

40. With regard to discovery already served, Big Lots has raised no objection to producing responsive documents for only a limited period of time, custodians and utilizing a narrow set of search terms. In its later emails with Plaintiffs, Big Lots now attempts to impose such limits. It is questionable whether defendants can raise a valid objection simply by setting an arbitrary limit on its production and not stating what is objectionable about a request. See Fed. R. Civ. P. 34(b)(2)(B)(stating that a party must state the reasons for its objection). However, even if Big Lots were able to do so, such an objection was waived when Big Lots did not timely raise that objection in its initial responses.

41. Therefore, Plaintiffs challenge the sufficiency of these limitations and request that this Court make a determination as to whether Big Lots has or will violate its obligations under Rule 26(g) to conduct a reasonable inquiry prior to responding.

Wherefore, Plaintiffs respectfully request that this Court issue an order entering the ESI Protocol in the form attached hereto as Exhibit F. Plaintiffs further request that this Court compel Big Lots to provide Plaintiffs with metadata and electronic text for documents previously produced, expand its search for responsive documents to include the period beginning when Big Lots' first began contemplating the sale of the subject products and ending at the present time, demonstrate why Big Lots should limit its search for responsive documents to eleven custodians only, and demonstrate that its past and proposed search methodologies are reasonable.

Respectfully Submitted,

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